Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

MEDICAL TRANSPORTATION MANAGEMENT CORPORATION, ZUNI TRANSPORTATION, INC.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are paratransit operators who furnish transportation services for handicapped individuals pursuant to the Americans With Disabilities Act ("ADA"). Petitioners use vans and sedans in rendering these services. Section 6421 (b) of the Internal Revenue Code ("Code") provides for the refund of gas taxes paid at the gas pump if the gas is used by an "automobile bus" while furnishing public transportation which is "scheduled" and "along regular routes." The term "automobile bus" was added to current Section 6421 in 1978 by the Energy Tax Act of 1978. The Eleventh Circuit, applying the plain meaning rule of construction, found the term "automobile bus" unambiguous and interpreted the term "automobile" as an adjective meaning "power[ed] within itself" which modified the noun "bus" such that the term "automobile bus" meant a self powered (motor-driven) bus to distinguish it from other buses such as horse drawn buses. See Opinion pages 5 and 6. Put simply, the Court found that the term "automobile bus" just meant "bus" and thus disqualified Petitioners' vans and sedans from the benefits of the statute.

The question presented is whether the Eleventh Circuit erroneously applied the plain meaning rule of construction and ignored the patent ambiguity presented by the term "automobile bus," added in 1978, an era in which the term "bus" standing alone was clearly understood to mean a motor-driven or self powered bus, such that a reader of the term "automobile bus" in 1978 would find this term

ambiguous, permitting resort to the 1978 legislative history and other sources to determine the term's meaning (which legislative history explicitly states that "vans and similar vehicles" qualify as buses therein under specified circumstances. See Senate Report, Explanation of provisions section, in Appendix).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent corporations nor are there any publicly held companies that own ten percent (10%) or more of either Petitioner's stock.

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JURISDICTION

The Court of Appeals entered its judgment on November 9, 2007. The timely Petition for Re-Hearing was denied on January 4, 2008, and is reprinted at Appendix page 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 6421(b) of the Internal Revenue Code of 1986, as amended.

Section 6421(b) Intercity, local, or school buses.

(1) Allowance. Except as provided in paragraph (2) and subsection (I), if gasoline is used in an automobile bus while engaged in--

(A) furnishing (for compensation) passenger land transportation available to the general public, or

(B) the transportation of students and employees of schools (as defined in the last sentence of section

4221(d)(7)(C) the Secretary shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to the product of the number of gallons of gasoline so used multiplied by the rate at which tax was imposed on such gasoline by section 4081

(2) Limitation in case of nonscheduled intercity or local buses. Paragraph (1)(A) shall not apply in respect of gasoline used in any automobile bus while engaged in furnishing transportation which is not scheduled and not along regular routes unless the seating capacity of such bus is at least 20 adults (not including the driver).

STATEMENT OF THE CASE

Petitioners Medical Transportation Management Corporation ("Medical Transportation") and Zuni Transportation, Inc. ("Zuni") are paratransit operators in Miami-Dade County, Florida who use vans and sedans to provide transportation services for the handicapped under ADA. The vans and sedans are marked with Miami-Dade County paratransit logos and otherwise restricted for use in providing paratransit services only. The drivers of these vehicles are required to obtain special drivers licenses for transporting the disabled, undergo specialized paratransit training as well be subject to other ADA requirements. Medical Transportation claimed fuel tax credits of $58,673 and $62,000 on its 1998 and 1999 income tax returns, respectively, while Zuni claimed credits of $32,758 and $21,582, on its income tax returns for the same years. The credits were denied by the IRS, each petitioner received a notice of deficiency,

and each petitioner filed a petition in the Tax Court where the two cases were consolidated and tried. The Tax Court had jurisdiction pursuant to Section 6213(a) of the Code.

The Tax Court upheld the IRS determination, finding that the Section 6421(b) term "automobile bus" meant "bus" and therefore Petitioners' vans and sedans failed to qualify for the credit. The Tax Court alternatively held that Petitioners' services were not "scheduled" and "along regular routes" as also required under Section 6421(b).

Petitioners then appealed the Tax Court decision to the Eleventh Circuit. The Eleventh Circuit held that the term "automobile bus" simply meant "bus" and did not reach the Tax Court's alternate holding. Petitioners subsequently filed a Motion for Rehearing which was denied.

REASONS FOR GRANTING THE PETITION

I This Is a Case of Great National Importance to the Paratransit Industry and of First Impression Where the Courts below Interpreted the Term "Automobile Bus" in Section 6421(b) to Simply Mean "Bus" and Thereby Exclude the Vans, Sedans and Other Non-Bus Vehicles Used by Paratransit Operators Throughout the U.S. From the Benefits under the Statute.

There are an estimated 2,100 paratransit providers in the U.S. who operate 26,000 vehicles in

providing mobility for over 150 million passengers annually. [1] The Eleventh Circuit and Tax Court determinations below that the Section 6421(b) term "automobile bus" means "bus" and excludes vans, sedans and other non-bus vehicles, deprives paratransit operators throughout the U.S. who use vans, sedans and other non-bus vehicles and claim the credit, of the related tax credit. The individual effect of this holding will be to cause each of these paratransit operators who claim the credit to either pass this cost on to the public, cut back on the related paratransit service, or even go out of business. The cumulative effect of the holding at the national level is to shift fuel tax revenues in the millions of dollars [2] away from

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[1] See Taxicab, Limousine, and Paratransit Association website, the largest paratransit association in the U.S. at www.TLPA.org.

[2] Of the 26,000 vehicles used by the paratransit industry, an estimated 31% are wheelchair accessible vans, 7% non wheelchair accessible vans, 50% sedans and 12% bus or minibus. See TLPA Paratransit & Contracting Fact Book (Statistics on the U.S. Paratransit & Contracting Industry)(2006 by TLPA). Although Petitioners have not found any statistics, based on the Amici Curiae brief filed below with the Eleventh Circuit, knowledge of the paratransit industry and contact with other paratransit operators and related associations, Petitioners estimate that at least 50% of the paratransit operators in the U.S. are similarly claiming the fuel tax credit on their tax returns. If Petitioners' claimed credits are used as an average (a nominal sum in light of the much larger providers who operate in the U.S.), then the revenues saved by the providers nationwide would be $45,940,650 computed as follows:

Average revenue ($58,673+$62,000+ $32,758+ $21,582=$175013/4 =	$ 43,753

these paratransit operators, causing either the total cost to the public to increase, or portions of the services to be eliminated, thus directly affecting and undermining the transportation objectives of the ADA.[3] Accordingly, the Eleventh Circuit's decision involves an important question of federal law of great national importance, which should be decided by this Court.

This Court should also note that virtually every paratransit operator in the U.S. uses wheelchair vans in addition to other vehicles (buses, sedans etc.) in

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Paratransit operators in U.S.	= 2,100	
Estimated percent taking credit	= X 50%	
Estimated filers taking credit	=	1,050
Estimated annual national savings to U.S. operators who claim credit		$45,940,650
Percent applicable to wheelchair vans (assumes equal use of gas per vehicle)		X 31%
Est. annual savings from wheelchair van use (31% X $45,940,650=		$14,241,601
Est. annual savings from sedan use (50% X $45,940,650=		$22,970,325
Est. annual savings from non-wheel chair van use (7% X $45,940,650=		$ 3,215,846
Est. total savings to vans and sedan users		$40,427,772
Est. annual savings from bus use (12% X $45,940,650=		$ 5,512,878

[3] See the Amici Curiae Brief filed below for expansive arguments on how the Tax Court's decision undermines both the ADA and the purposes of Section 6421.

providing the paratransit services required under ADA. This is because theses vans can travel into neighborhood areas where buses cannot reach due to size and other constraints, and use their wheelchair lifts for pick up of wheelchair bound passengers. See trial Transcript below pages 120, 126-127,137-138. These wheelchair vans are therefore critical to the proper functioning of the transportation segment of the ADA and are favored under the ADA. See generally the *ADA Paratransit Handbook: Implementing the Complementary Paratransit Service Requirements of the Americans with Disabilities Act of 1990.* (1991) Washington DC: U.S. Department of Transportation, Urban Mass Transit Administration.

The Eleventh Circuit's exclusion of vans from receiving the benefits under Section 6421 will cause paratransit operators who use wheelchair vans (and claim the credit) to either pass the additional cost to the public, or cut back the van service. If the van services are cut back, then the Eleventh Circuit decision will have the effect of undermining the ADA transportation services as well as the underlying purposes of the ADA. Once again, a decision of this nature which may affect the rights of handicapped individuals to access public transportation, is best decided by this Court.

II The Decision Below is Incorrect

A. The Court Below Erred in Concluding That the Term "Automobile Bus" Was Unambiguous and to Be Interpreted in Accordance with its Ordinary Meaning

with the Term "Automobile" as an Adjective Meaning Self Powered Which Modified the Noun "Bus" Such That the Term "Automobile Bus" Meant Self Powered or Motor-driven Bus.

The Eleventh Circuit interpreted the term "automobile bus" to simply mean "bus." The Circuit Court, adopting all the IRS's arguments, determined that the word "automobile" was used as an adjective meaning "power[ed] within itself" to modify the noun "bus" such that the term "automobile bus" meant a self powered or motor-driven bus, as distinguished from other buses (such as horse drawn buses). See Opinion pages 5 and 6. The fact that the term "automobile bus" was added to Section 6421(b) in 1978, an era in which motor-driven buses were not only common place, but possibly the only type of bus in existence at that time, such that everyone knew buses were motor driven without the adjective "automobile," thus rendering the usage of the term "automobile" superfluous or unnecessary, was of no concern to the Circuit Court. Here, the Circuit Court, again adopting the IRS's argument, stated that:

> When Congress amended section 6421(b) in 1978, Congress had long used the adjective "automobile" in tax statutes in reference to motor-driven vehicles. *See, e.g.*, Revenue Act of 1917, Pub. L. No. 65-50, § 600(a), 40 Stat. 300, 316 (imposing taxes on "automobile trucks" and "automobile wagons"); 26 U.S.C. 4061(a) (1982) (repealed 1982) (imposing taxes on "automobile bus" chassis and bodies); *cf. Ace-Chicago Great*

> *Dane Corp. v. United States*, 726 F.2d 321, 324 n.3, 326 (7th Cir. 1984) (discussing "trucks" when the provision of the Internal Revenue Code applied to "automobile trucks"). Congress adhered to that tradition in its use of the term "automobile bus" in section 6421(b). See page 7 of Opinion.

The Circuit Court then goes on to state that the term "automobile bus" was "transplanted" from these statutes and "brings the old soil with it, " quoting *Evans v. United States*, 504 U.S. 255, 260 n3, 112 S. Ct. 1881, n3 (1992) and that where "Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed," quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 250 (1952).

The first statute noted above, Section 600(a) containing the terms "automobile truck" and "automobile wagons," was enacted in 1917 as part of the Revenue Act of 1917. The second statute, Section 4061(a) containing the terms "automobile bus chassis" and "automobile truck chassis" and mentioned in the above *Ace-Chicago Great Dane Corp.* case, was enacted in 1939 as part of the Internal Revenue Code of 1939. These statutes were enacted during times that horse drawn buses, wagons, carriages and trucks were still in existence and the adjective "automobile," meaning motor-driven, was needed in order to distinguish the

motor-driven wagon, motor-driven truck chassis or motor-driven bus chassis from the horse drawn wagon, horse drawn truck chassis or horse drawn bus chassis and make clear who were the object of the tax these statutes sought to impose.

By 1978, the year the term "automobile bus" was added to Section 6421(b), the need for the adjective "automobile" to precede "bus" to indicate motor-driven had long ceased to exist. In fact, by at least the year 1959, Congress was using the terms automobile, bus, and trucks to mean motor-driven cars, buses, and trucks. This is clear from former Treas. Reg. § 48.6421, published December 22, 1959 by Treasury Decision 6433, which pertained to and implemented former Section 6421 (the statute at issue in this case), as enacted under the Highway and Revenue Act of 1956, which defined the term "highway vehicle" under subsection (c) as:

> any vehicle which is propelled by its own motor or engine and which is of the type used for highway transportation. Such term does not include any vehicle which moves exclusively on rails. It does include automobiles, trucks, buses, highway tractors, trolley buses, and other similar type vehicles. (Emphasis added.)

Thus, by 1959, the regulation which implemented former Section 6421, had specific provisions describing motor-driven cars, trucks and buses as simply automobiles, trucks and buses without the adjective "automobile" preceding the noun to indicate motor-driven. Nineteen (19) years later in

1978, former Section 6421 would be amended and the term "automobile bus" would be added to its text. This serves as overwhelming proof that both the 1959 and 1978 Congresses knew full well that the term "bus" meant motor-driven bus and that the 1978 Congress must have intended the term "automobile bus" to mean something other than a bus since it already knew that a bus was motor-driven.

Furthermore, the Eleventh Circuit's finding that the term "automobile bus" was "transplanted" from these old statutes under *Evans v. United States* as well being a "term of art" which was borrowed from these old statutes pursuant to *Morissette v. United States* is similarly incorrect. First, this transplanting or borrowing of a term of art has its basis in the maxim that a statutory term is generally presumed to have its common law meaning. See *Evans* at page 259. Both the *Evans* and *Morissette* cases involved criminal statutes which had codified common law crimes. Since this case does not involve the usage of a previously known common law crime (or any common law matter), it would appear that these cases and their principals have no application here. Nevertheless, assuming that the Circuit Court understands these cases to mean that formerly used terms with established meanings carry the same meaning when used again in the future, the Circuit Court is still wrong. This is because neither the terms "automobile bus," nor "automobile truck" were ever defined or had established meanings. So there is no term to be "transplanted" nor any "term of art" to be borrowed and reused.

Accordingly, what the Eleventh Circuit did was to attempt to transplant the use of the adjective "automobile" used back in 1917 and in 1939 to show motor-driven bus (automobile bus) or motor driven truck (automobile truck) in 1978. (The term "automobile bus" never defined by either the 1917 or 1939 statutes). Thus, neither the *Evans* nor *Morissette* transplant principals have application here.

Finally, note the very low probative value of the Circuit Court's conclusion here. It is relying on an adjective used in a 1917 and in a 1939 statute as evidence of what the 1978 Congress intended with the term "automobile bus." Thus, there is a minimum of 39 years between the use of the adjective "automobile" in the 1939 statute and the use of the term "automobile bus" in the 1978 statute. Add to this that everyone in 1978 knew that a bus was motor-driven, and one becomes convinced that the term "automobile bus" must have meant something other than motor-driven bus. Petitioners believe that the Circuit Court was wrong here and once again point to the express usage of the terms automobiles, trucks and buses as motor-driven vehicles in 1959 by former Treas. Reg. § 48.6421(c) above as convincing proof that the 1978 Congress intended the term "automobile bus" to mean something other than "bus."

B. The Term "Automobile Bus" Is Ambiguous Permitting Resort to Legislative History and Other Sources to Determine its Meaning.

The Circuit Court's determination that the term "automobile bus" was clear and unambiguous prohibited resort to the legislative history of Energy Act of 1978 and other sources under the plain meaning rule of construction. Assuming that the term "automobile" in "automobile bus" is not to be interpreted as a an adjective meaning motor-driven that modifies bus, the term "automobile bus" becomes ambiguous and unclear. Here each of the words "automobile" and "bus" are to be given effect such that neither word becomes "superfluous, void or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2125 (2001). However, construing the two words together results in differing understandings of the term "automobile bus." [4] The test for ambiguity is that the term is capable of being understood in two or more possible ways. *Chiskasaw Nation v. United States*, 534 U.S. 84, 90, 122 S. Ct. 528(2001). Here, the term "automobile bus" can not be readily understood and therefore meets and perhaps surpasses this test since one must guess at its meaning. Therefore, resort to the legislative history of the statute and other sources for assistance in determining its meaning is warranted.

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[4] Petitioners suggested below that upon first reading the term "automobile bus," one envisions an automobile which functions or is used like a bus. This meaning is derived by treating "automobile" as the noun whose use is described by the adjective "bus" following the term such that the item is understood to be an automobile used like a bus.

C. The Legislative History and Related Regulations Evidence Congress's Intent To Include "Vans and Similar Vehicles" as "Automobile Buses."

The Senate Report pertaining to the amendment of Section 6421 by the Energy Tax Act of 1978 (the "Senate Report") set out in the Appendix hereto provides in the third paragraph of the "Explanation of provisions" section that an "intercity or local bus" is a "bus" which performs the tasks and has the traits set forth therein in order to qualify for the benefits under the statute. There are two criteria for qualifying for the benefits. The second and of no concern here is being a bus which has a seating capacity of 20 or more passengers. The first criteria which is relevant here is being a bus which travels scheduled and regular routes. Under this qualifying criteria, the report states that the size or passenger capacity of the bus is unimportant as long as the specified criteria is met. The last sentence of this paragraph implies and states "vans and similar vehicles used for van pooling or taxi service" qualify for the benefits when providing regularly scheduled transportation service. Thus, the Senate Report clearly evidences Congress's intent that "vans and similar vehicles" qualify as "automobile buses" under the statute.

Treas. Reg. Section 48.4221-8(b)(2), which pertains to the section 4221(e)(3) exemption from the section 4071 excise tax on rubber tires, was enacted as part of the Energy Tax Act of 1978, and is almost identical to the above Senate Report's definition of "intercity or local bus." One difference is that the

regulation begins by defining the term "intercity or local bus" as an "automobile bus" (and not "bus") which performs the tasks and has the traits set out in the above Senate Report. The other difference is that the last sentence of the Senate Report noted above concerning "vans and similar vehicles" is missing. However, the regulation clearly states that under scheduled and regular route qualifying criteria, "the size of the bus is not relevant for purposes of determining whether of not the use of the bus qualifies for the exemption." See Appendix for full text of this regulation. This regulation again evidences that size is irrelevant under the first Section 6421 qualifying criteria, thereby undermining the Circuit Court's holding that "automobile bus" includes buses only. [5]

D. Other Statutes and Regulations Evidence Congress's Intent That Vans Be Included as "Automobile Buses."

Section 46(c)(6), also enacted by the Energy Tax Act of 1978, is indicative of Congress's preference for the use of such vans for transportation. This statute increased the investment credit for purchases of vans by employers for van pooling their employees to and from work. The Senate Report notes that "'van pooling'

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[5] The IRS copied the above Senate Report's definition of "intercity or local bus" in drafting this regulation. Pursuant to basic well settled rules of statutory interpretation, this regulation, derived from same Act and the exact same Senate Report section and paragraph which pertained to both Section 6421 and Section 4221(e)(3), and which pertains to the same subject matter, applies equally to Section 6421 herein as if it contained an express statement to that effect.

is an energy efficient means of transportation in comparison to commutation to work by private automobile" and that "it is desirable to provide greater incentive for the purchase of such vans for van pooling purposes than is provided under current law." See S. Rep. No. 95-529, at 57 (1978) in Appendix. Thus, § 46(c)(6) and the related legislative history show that Congress also favors vans and not just buses as the Circuit Court held and that therefore vans be included as "automobile buses" under the statute.

Former Proposed Treasury Regulation § 48.4061(a)-3(b) expressly provided that the "term 'automobile bus' means a motor vehicle which is designed for commercial or industrial use and which is capable of transporting 8 or more adult passengers..., in addition to the driver." In other words, this proposed regulation defined the term "automobile bus" as van. This regulation was proposed on December 30, 1982 and effectively repealed when the underlying statute, § 4061, was repealed in 1984. This 1982 proposed regulation, essentially contemporary with the 1978 Act, shows that the term "automobile bus" was being used anew or for the first time, and set forth an express definition which made sense in light of § 6421(b) and history. It again shows the Treasury's (and Congress's) express intent to include vans within the meaning of "automobile bus" and negates the Circuit Court conclusion that the term includes only buses.

E. The Underlying Purposes of Original Section 6421 and of the 1978

Amendments to Section 6421 Evidence Congress's Intent That Private Local Transit Systems Like Petitioners' Paratransit Operations Qualify for the Benefits and Their Vehicles Qualify as "Automobile Buses."

The underlying purpose of § 6421 is to provide relief to local mass transit. See *Greyhound Corp. v. United States*, 495 F.2d 863, 868 (9th Cir. 1974). Paratransit operations, which came into existence as a result of the enactment of the ADA in 1990, legally constitute an integral and inseparable part of local mass transit systems under the ADA. See 42 USC Section 12143(a) titled "Paratransit as a complement to fixed route service" set out in the Appendix. Therefore these paratransit operators are the intended beneficiaries under Section 6421 and their vehicles should qualify for the benefits under the statute such that their vans and sedans in addition to buses would qualify as "automobile buses" under the statute.

Additionally, prior to the 1978 amendment of Section 6421, local government transit, which was the typical fixed route transit that one is familiar with (with the large metro buses following prescribed routes with set stops and bus benches), was exempt from this tax. The "Reasons for change" section of the Senate Report set out in the Appendix hereto, after noting this extended "the present exemptions from the taxes on ....gasoline ... to privately owned intercity and local bus operations ....not presently exempt from these taxes." Thus Congress aware that government fixed route transit was exempt from the tax, deliberately extended

the benefits of the statute to private local transit. Since Congress knew that fixed route transit was all government operated, its amendment of the statute, including the addition of the term "automobile bus," had as its target beneficiaries, private transit other than fixed route transit (with its large metro buses) which was furnished by the government. Today this private transit must necessarily include paratransit operations and all of their vehicles since they form an integral and legally inseparable part of local governments' fixed route transit under ADA. See 42 USC Section 12143(a) titled "Paratransit as a complement to fixed route service" in Appendix. Therefore, Petitioners vans and sedans should qualify as "automobile buses" herein.

See also, Section D, "Other Proposal" of the Joint Committee On Taxation, Report for the Committee on Finance, United States Senate, dated September 16, 1977, 95-171, at page 33 , in Appendix hereto, which provided with respect to the pending 1978 amendments to section 6421 that it "has been suggested that similar tax treatment should be provided for taxicabs, at least where shared ride programs are in effect." Thus, Congress had considered extending the benefits of the 1978 Energy Act to taxis which implemented shared ride programs. Similarly, the Report of the Ad Hoc Committee On Energy of the House of Representatives [6], dated July

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[6] This special committee was established to reconcile the recommendations of the standing committees, and fashion a comprehensive legislative package. See S. Report No. 95-543 (Vol 1) (1977) at page 3.

17, 1977, S. Report No. 95-543 (Vol 1) (1977) at page 50, also set out in the Appendix, provided for the transfer of gas tax revenues to The Mass Transportation Account to be used "for mass transportation by bus, rail, and so forth; for exclusive or preferential lanes for buses, vans and cars; and for car and van pooling." Page 54 of the report provided that all forms of efficient mass transportation were intended to benefit. These beneficiaries included (1) exclusive or preferential lanes for buses, vans, and cars, and (2) car and van pooling and (3) even efficiently used privately owned vehicles (like car pooling). These reports evidence Congress's intent not to limit the benefits of section 6421 and related sections solely to buses.

F. Petitioners Proposed Definition of the Term "Automobile Bus."

Petitioners wish to clarify and briefly set out their proposed definition of the term "automobile bus" which the Circuit Court rejected. See Opinion page 8. First Petitioners, like many who first begin to analyze the term "automobile bus," suggest that the term mean something like an automobile which is used or functions like a bus. This appears a viable meaning if the noun is "automobile" and the adjective is "bus." The second definition which is based on the legislative history, purposes of the statute, and other statutes previously discussed, is that an "automobile bus" includes (1) all buses and vans and (2) sedans which are marked, restricted for use and actually used in

public mass transit. [7] (See Reply Brief page 19 for a complete and accurate proposed definition of "automobile bus" by Petitioners).

Lastly, the Tax Court entered an alternate holding stating that Petitioners did not meet the "scheduled" and "along regular routes" criteria of Section 6421(b). Petitioners want this Court to note that they honestly and in good faith believe that the Eleventh Circuit will reverse the alternate holding if the issue were presented to the Circuit Court. Further in this respect, Petitioners believe that the Circuit Court purposely decided the case on the "automobile bus" meaning in order to avoid the second issue and reversal of the Tax Court here. Petitioners point this out to this Court so that it knows that if it reverses the Eleventh Circuit here, the case will not in all likelihood be lost on the other issue. See the Briefs below on this issue.

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[7] All of these vehicles still have to meet the "scheduled" and "along regular routes" requirement of the statute to qualify for the credit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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506 F.3d 1364, *; 2007 U.S. App. LEXIS 26136, **; 2007-2 U.S. Tax Cas. (CCH) P70,269; 100 A.F.T.R.2d (RIA) 6600

MEDICAL TRANSPORTATION MANAGEMENT CORPORATION, ZUNI TRANSPORTATION, INC., Petitioners, versus COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent.

No. 06-16583

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

506 F.3d 1364; 2007 U.S. App. LEXIS 26136; 2007-2 U.S. Tax Cas. (CCH) P70,269; 100 A.F.T.R.2d (RIA) 6600; 21 Fla. L. Weekly Fed. C 169

November 9, 2007, Decided
November 9, 2007, Filed

PRIOR HISTORY: [**1]

Petition for Review of a Decision of the United States Tax Court. U.S. Tax Ct. Nos. 10699-04 & 10700-04. *Medical Transp. Mgmt. Corp. v. Comm'r, 127 T.C. 96, 2006 U.S. Tax Ct. LEXIS 27 (2006)*

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner transportation company taxpayers appealed the decision of the United States Tax Court in favor of respondent Commissioner of the Internal Revenue Service that denied them income tax credits under *I.R.C. §§ 34, 6421(b)* for gasoline excise taxes paid, arguing they purchased gasoline for vehicles that were classified as "automobile buses," which was a requirement for the income tax credits.

OVERVIEW: The taxpayers used sedans and vans that had a seating capacity of fewer than 20 adults to provide the transportation services for disabled passengers, but stipulated they did not use "buses." The reasonable interpretation of "automobile bus" was that it was a motor bus or what one would understand simply as a "bus" -- a large motor vehicle designed to carry passengers. The adjective "automobile" distinguished a motor-driven bus from other buses. The argument that "automobile bus" meant a "4 wheeled vehicle" used or which functioned like a bus strained ordinary rules of grammar. *I.R.C. § 6421(b)* described how a qualified vehicle would function, and the term "automobile bus" was reasonably understood as describing the physical characteristics of a qualified vehicle. Nothing about the term "automobile bus" or *I.R.C. § 6421(b)* reasonably suggested that certain vehicle markings were relevant or necessary. Because an "automobile bus" was a "bus," the taxpayers were not entitled to the income tax credits.

OUTCOME: The decision of the Tax Court was affirmed.

COUNSEL: For Medical Transportation Management Corporation, Zuni Transportation, Inc., Appellants: Saavedra, Jose A., Law Offices of Jose A. Saavedra, SOUTH MIAMI, FL.

For Commissioner of IRS, Appellee: Sheehan, Anthony T., USDOJ, Tax, WASHINGTON, DC.

For Appellee: Ellisen, Bruce R., Dept. of Justice, Appellate Tax Division, WASHINGTON, DC.

For Laidlaw Transit Services, Inc., MV Transportation, Amicus: Parker, Warrington S. III, Heller Ehrman LLP, SAN FRANCISCO, CA.

JUDGES: Before ANDERSON and PRYOR, Circuit Judges, and VINING,* District Judge.

* Honorable Robert L. Vining, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

OPINION BY: PRYOR

OPINION

[*1366] PRYOR, Circuit Judge:

This appeal presents a question that only a court of law and linguists would entertain: whether an "automobile bus" is a "bus." Medical Transportation Management Corporation and Zuni Transportation

appeal the decision of the Tax Court that denied them income tax credits for gasoline excise taxes they had paid. *See 26 U.S.C. § 6421(b).* The taxpayers argue that they purchased gasoline for vehicles that are classified as "automobile buses," which is a requirement for the income tax credits, but the taxpayers concede that they did not use "buses." Because we conclude that an "automobile bus" is a "bus," the taxpayers are not entitled to the income tax credits. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The taxpayers provide paratransit services to the Metro-Dade Transit Authority. The Americans with Disabilities Act of 1990 requires local governments that operate [**2] fixed-route transportation systems available to the general public to provide paratransit services to the physically and mentally disabled. To satisfy its obligations under the ADA, the Metro-Dade Transit Authority entered into a contract with Comsis Mobility Services, Inc., a private company that acted as a transportation broker and scheduler. Comsis, in turn, contracted with the taxpayers and others to provide the paratransit services. Eligible passengers could either make a reservation for a one-time ride between two points or establish a subscription for recurring trips. The taxpayers used sedans and vans that have a seating capacity of fewer than 20 adults to provide the paratransit services, and the taxpayers stipulate that they did not use "buses."

On their income tax returns for 1998 and 1999, the taxpayers claimed credits for excise taxes that they had paid for purchases of gasoline. Medical Transportation claimed $ 58,673 and $ 62,000,

respectively, for the two years, and Zuni Transportation claimed $ 32,758 and $ 21,582, respectively. The Commissioner of Internal Revenue denied the credits [*1367] and mailed each taxpayer a notice of deficiency.

The taxpayers petitioned the Tax Court [**3] for a redetermination of the deficiencies. The taxpayers sought the credits under *sections 34* and *6421 of the Internal Revenue Code. 26 U.S.C. §§ 34, 6421. Section 6421(b)* provides that "if gasoline is used in an automobile bus" the Secretary of the Treasury shall credit the amount of tax imposed on the gasoline against a private taxpayer's tax liability. If an "automobile bus" has a seating capacity of fewer than 20 adults, not including the driver, then the credit is unavailable unless the "automobile bus" furnishes transportation that is scheduled and along regular routes. *26 U.S.C. § 6421(b)(2).*

The taxpayers' cases were consolidated and went to trial. The Tax Court upheld the determinations of the Commissioner. *Med. Transp. Mgmt. Corp. v. Comm'r, 127 T.C. 96, 108 (2006).* The Tax Court determined that the taxpayers failed to establish that they paid taxes on gasoline for "automobile buses." *Id. at 105.* The Tax Court concluded alternatively that the taxpayers did not furnish transportation that was scheduled and along regular routes. *Id. at 105-07.*

II. DISCUSSION

Section 34 of the Internal Revenue Code provides a credit for certain gasoline purchases:

> There shall be allowed as a credit [**4] against the tax imposed by this subtitle for the taxable year an amount equal to the sum of the amounts payable to the taxpayer . . . under *section 6421* with respect to gasoline used during the taxable year . . . in vehicles while engaged in furnishing certain public passenger land transportation service . . . .

26 U.S.C. § 34. Section 6421(b) defines the circumstance in which taxpayers can receive the credit under *Section 34*.

> (1)Allowance--Except as provided in paragraph (2) and subsection (I), if gasoline is used in an *automobile bus* while engaged in--
>
> > (A) furnishing (for compensation) passenger land transportation available to the general public, or
> >
> > (B) the transportation of students and employees of schools (as defined in the last sentence of *section 4221(d)(7)(C)*), the Secretary shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to the product of the number of gallons of gasoline so used multiplied by the rate at which tax was

> imposed on such gasoline by *section 4081.*
>
> (2) Limitation in case of nonscheduled intercity or local buses.-- Paragraph (1)(A) shall not apply in respect of gasoline used in any automobile bus while engaged in furnishing [**5] transportation which is not scheduled and not along regular routes unless the seating capacity of such bus is at least 20 adults (not including the driver).

26 U.S.C. § 6421(b) (emphasis added).

The taxpayers contend that the term "automobile bus" is ambiguous and argue that their vans and sedans are "automobile buses." Whether an "automobile bus" is a "bus" is an interpretation of a statutory provision that we review *de novo. Estate of Shelfer v. Comm'r, 86 F.3d 1045, 1046 (11th Cir. 1996).* We disagree with the taxpayers' interpretation of *section 6421.*

"The starting point for all statutory interpretation is the language of the statute itself," *United States v. DBB, Inc., 180 F.3d 1277, 1281 (11th Cir. 1999)*, and [*1368] our task "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case," *Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997).* "Our inquiry must cease if the statutory language is unambiguous

and 'the statutory scheme is coherent and consistent.'" *Id. at 340, 117 S. Ct. at 846* (quoting *United States v. RonPair Enters., Inc., 489 U.S. 235, 240, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989)).* "The plainness [**6] or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id. at 341, 117 S. Ct. at 846.* Statutory language is ambiguous if it is susceptible to more than one reasonable interpretation. *See Atl. States Legal Found., Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1138 (11th Cir. 1990)* (statutory language unambiguous because "capable of only a single reasonable interpretation").

The term "automobile bus," as used in the Internal Revenue Code, has a single reasonable interpretation. A reasonable reader would understand "automobile" as an adjective that modifies the noun "bus." The Oxford English Dictionary defines the adjective "automobile" as "moves by means of mechanism and power within itself . . . ." *1 The Oxford English Dictionary* 806 (2d ed. 1989). The dictionary defines the noun "bus" as "[a] familiar shortening of omnibus," *2 The Oxford English Dictionary* 688 (2d ed. 1989), and it defines the noun "omnibus" as "[a] large public vehicle carrying passengers by road, running on a fixed route and typically requiring the payment of a fare . . . ," *10 The Oxford* [**7] *English Dictionary* 788 (2d ed. 1989). The reasonable interpretation of "automobile bus" is that it is a motor bus or what one would understand today simply as a "bus"-- "a large motor vehicle designed to carry passengers." *Merriam-Webster Collegiate Dictionary* 154 (10th ed. 1996).

The taxpayers contend that this interpretation is unreasonable because it renders the word "automobile" superfluous. We disagree. The adjective "automobile" distinguishes a motor-driven bus from other buses. *Cf. 2 The Oxford English Dictionary* 688 (2d ed. 1989) (mentioning in definition of "omnibus" horse-drawn buses).

When Congress amended *section 6421(b)* in 1978, Congress had long used the adjective "automobile" in tax statutes in reference to motor-driven vehicles. *See, e.g.*, Revenue Act of 1917, Pub. L. No. 65-50, § 600(a), 40 Stat. 300, 316 (imposing taxes on "automobile trucks" and "automobile wagons"); *26 U.S.C. § 4061(a) (1982)* (repealed 1982) (imposing taxes on "automobile bus" chassis and bodies); *cf. Ace-Chicago Great Dane Corp. v. United States, 726 F.2d 321, 324 n.3, 326 (7th Cir. 1984)* (discussing "trucks" when the provision of the Internal Revenue Code applied to "automobile trucks"). Congress [**8] adhered to that tradition in its use of the term "automobile bus" in *section 6421(b).* "[A] word . . . obviously transplanted from another legal source, whether the common law or other legislation, . . . brings the old soil with it." *Evans v. United States, 504 U.S. 255, 260 n.3, 112 S. Ct. 1881, 1885 n.3, 119 L. Ed. 2d 57 (1992)* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)) (internal quotation mark omitted). "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherewise

instructed." *Morissette* [*1369] *v. United States, 342 U.S. 246, 263, 72 S. Ct. 240, 250, 96 L. Ed. 288 (1952).* "[A]bsence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id. at 263, 72 S. Ct. at 250.*

The taxpayers suggest two alternate interpretations, neither of which is reasonable. They first argue that "automobile bus" means "a '4 wheeled vehicle' used or which [**9] functions like a bus." This interpretation strains ordinary rules of grammar. The taxpayers cannot establish that their vehicles are "automobile buses" under *section 6421(b)* by establishing that their wheels, in the words of a common song for children, "go round and round, round and round." *Section 6421(b)* describes how a qualified vehicle will function, and the term "automobile bus" is reasonably understood as describing the physical characteristics of a qualified vehicle.

The taxpayers alternatively suggest an interpretation that outlines the physical characteristics of a qualified vehicle. The taxpayers "would define th[e] term ['automobile bus'] to mean a vehicle which is marked and restricted for use in providing public mass transportation," which includes "all marked and restricted for public mass transit use sedans." Nothing about the term "automobile bus" or *section 6421(b)* reasonably suggests that certain vehicle markings are relevant or necessary. This interpretation suggested by the taxpayers may be convenient to their circumstances, but it can not reasonably be derived from the language of the statute.

The taxpayers' argument does not require that we determine when a vehicle [**10] can be classified as a bus. The taxpayers concede that their vehicles are not buses. We leave for another day the question whether a van or other vehicle can be classified as a bus.

Our interpretation of the term "automobile bus" resolves this appeal. We need not consider the arguments of the taxpayer that their transportation services satisfied the other requirements of *sections 34* and *6421*. We do not reach the alternative rulings of the Tax Court.

III. CONCLUSION

Because we conclude that "automobile bus" means "bus" for purposes of *section 6421(b) of the Internal Revenue Code*, the judgment of the Tax Court is

AFFIRMED.

127 T.C. 96, *; 2006 U.S. Tax Ct. LEXIS 27, **; 127 T.C. No. 7

MEDICAL TRANSPORTATION MANAGEMENT CORPORATION, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent ZUNI TRANSPORTATION, INC., Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Nos. 10699-04, 10700-04

UNITED STATES TAX COURT

127 T.C. 96; 2006 U.S. Tax Ct. LEXIS 27; 127 T.C. No. 7

September 19, 2006, Filed

SUBSEQUENT HISTORY: Affirmed by *Medical Transp. Mgmt. Corp. v. Comm'r, 2007 U.S. App. LEXIS 26136 (11th Cir., Nov. 9, 2007)*

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, corporate taxpayers, operated paratransit services exclusively provided to disabled persons. The taxpayers used sedans and vans to provide transportation to their clients. Respondent Commissioner of Internal Revenue (Commissioner) asserted deficiencies that arose from the denial of the tax credit under *26 U.S.C.S. § 34*. The

Commissioner alleged that the taxpayers' service did not meet the requirements under *26 U.S.C.S. § 6421.*

OVERVIEW: The taxpayers used vans and four-door sedans to transport passengers. The issue was whether a sedan or van could qualify as an automobile bus under *26 U.S.C.S. § 6421.* This was an issue of first impression. The court applied the ordinary meaning of the word "bus" and held that "bus," short for the word "omnibus," was commonly defined as a large motor-driven vehicle designed to carry passengers usually according to a schedule along a fixed route. Although the description of "omnibus" as four-wheeled plausibly included a sedan, the sedans that the taxpayers used would not have been able to carry a large number of passengers. The court rejected the taxpayers' contention that the word "automobile" placed in front of "bus" as used in *§ 6421* showed congressional intent to alter or expand the plain meaning of the word "bus." Because the court concluded that the sedans did not qualify as "buses," even if the vans that the taxpayers used qualified as buses, the taxpayers were not eligible for the credit because the taxpayers failed to account for the number of gallons of gas attributable to each type of vehicle.

OUTCOME: The court found in favor of the Commissioner.

COUNSEL: Jose A. Saavedra, for petitioners.

Justin L. Campolieta, for respondent.

JUDGES: Goeke, Joseph Robert

OPINION BY: JOSEPH ROBERT GOEKE

OPINION

[*96] OPINION

GOEKE, Judge: Respondent determined the following deficiencies in petitioners' Federal income tax:

Medical Transportation Management Corp. docket No. 10699-04

Year	Deficiency
1998	$ 58,673
1999	62,000

[*97] Zuni Transportation, Inc. -- docket No. 10700-04

Year	Deficiency
1998	$ 32,758
1999	21,852

The issue in this case is petitioners' [**3] entitlement to an income tax credit under *section 34(a)(2)* for gasoline excise tax refundable with respect to certain uses under *section 6421.* [1] We hold that petitioners are not entitled to the credit.

1 Unless otherwise indicated, all section references are to the Internal Revenue Code, as amended, and all Rule

references are to the Tax Court Rules of Practice and Procedure.

Background

Petitioners are for-profit Florida corporations with their principal places of business and mailing addresses in Miami, Florida, at the time their petitions were filed. During the 1998 and 1999 taxable years, petitioners provided paratransit services for the physically and mentally disabled within Miami-Dade County, Florida, and portions of southern Broward County, Florida. The services petitioners provided were in fulfillment of their duties under a contract with Cosmis Mobility Services, Inc. (Cosmis). Cosmis is the transportation services broker for Miami-Dade County. Cosmis was under contract with the Metro-Dade Transit [**4] Authority (Transit Authority) to obtain transportation for the physically and mentally disabled to meet the requirements of the Americans With Disabilities Act of 1990 (ADA), Pub. L. 101-336, 104 Stat. 327. Petitioners had no contractual relationship with the Transit Authority.

Petitioners provided paratransit services exclusively through the use of vans and sedans with seating capacities of fewer than 20 adults, including the driver. Petitioners provided no evidence which permits the allocation of their gasoline usage between sedans and vans.

Petitioners' paratransit services were only available to members of the general public who were certified as disabled under the ADA. The vast majority of petitioners' passengers were individuals requiring transportation within Miami-Dade County.

Disabled passengers requiring paratransit services within Miami- Dade County could either make a reservation or set [*98] up a subscription. A reservation entailed a one-time ride between two points. Passengers were required to place the reservation at least 24 hours in advance, as well as designate the pickup and dropoff locations, and request a date and time for travel. A subscription service was available [**5] if the same trip was taken at the same day and time, at least once a week, week after week. For example, an individual who worked at a particular site for set days and times would obtain a subscription to be picked up and dropped off at the worksite, and picked up and dropped off at home, for the days of the week he or she selected, for the weeks he or she selected. Once a subscription was in place, it was no longer necessary for passengers to phone ahead and reserve transportation. Subscription service riders were also initially required to designate the initial pickup and dropoff locations and times. On any given day of travel, petitioners might have been required to provide "on-demand service" to passengers who were not listed in the original manifest but for medical reasons required immediate transportation.

Prior to each day's operation, Cosmis would obtain the necessary pickup information for each prospective passenger. Petitioners' contract with Cosmis required that petitioners maintain a listing of every trip dispatched and delivered. Cosmis would schedule these rides at least the night before the ride and download the information to petitioners before the travel day. The [**6] information was set out in a daily travel manifest containing the specified schedule to be followed and used exclusively for that specific

day. A new daily manifest was generated for each new travel day. Typical daily manifests would contain both reservation and subscription passengers. For each travel day, the daily manifest would contain the specific locations and times of the pickups and dropoffs. The information on daily manifests was subject to change from day-to-day based on daily passenger reservations and subscriptions. A daily manifest might or might not have included a stop that had been included on a previous or subsequent daily manifest. The specific routes traveled and schedules followed by petitioners' sedans and vans were derived from passenger subscriptions and daily reservations. The manifests did not contain the specific routes to be followed; the manifests only listed the names of the passengers and the times and locations of passengers' pickups and [*99] dropoffs. The drivers of the paratransit vehicles were not required to follow any particular route in servicing a run.

For the 1998 and 1999 taxable years, petitioner Medical Transportation Management Corp. (MTMC) claimed [**7] income tax credits of $ 58,673 and $ 62,000, respectively, for excise taxes it paid on gasoline. For the same taxable years, petitioner Zuni Transportation, Inc. (Zuni), claimed income tax credits of $ 32,758 and $ 21,852, respectively. On March 25, 2004, respondent timely mailed separate notices of deficiency denying petitioners the entire gasoline credit amount, and provided the following identical explanation:

It is determined that you do not meet the requirements for the fuel credit for gasoline under *section 6421(a)* of the Internal Revenue Code because you did not operate qualified buses on scheduled or

fixed routes, and the buses were not available to the general public.

Petitioners filed separate petitions with this Court seeking a redetermination. In their respective petitions, petitioners asserted that they met all of the requirements set forth in *section 6421(b)* and therefore were entitled to the income tax credit under *section 34(a)*.

Discussion

I. Background on *Section 34* Credit

Section 34 provides a credit against tax for the amount of excise taxes included in the price of gasoline to the ultimate purchaser of gasoline used [**8] on a farm for farming purposes, for other off-highway business use, by local transit systems, and by the operators of intercity, local, or school buses. See *secs. 34, 6420, 6421.*

Section 34(a) provides in relevant part:

SEC. 34(a) General Rule. -- There shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the sum of the amounts payable to the taxpayer --

* * * *

(2) under *section 6421* with respect to gasoline used during the taxable year (A) otherwise than as a fuel in a highway vehicle or (B) in vehicles while engaged in furnishing certain public passenger land transportation service * * *

[*100] *Section 6421(b)* provides in relevant part:

SEC. 6421(b) Intercity, Local, or School Buses. --

(1) Allowance. -- Except as provided in paragraph (2) and subsection (I), if gasoline is used in an automobile bus while engaged in --

(A) furnishing (for compensation) passenger land transportation available to the general public [**9] * * *

* * * *

the Secretary shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to the product of the number of gallons of gasoline so used multiplied by the rate at which tax was imposed on such gasoline by *section 4081.*

(2) Limitation in case of nonscheduled intercity or local buses. -- Paragraph (1)(A) shall not apply in respect of gasoline used in any automobile bus while engaged in furnishing transportation which is not scheduled and not along regular routes unless the seating capacity of such bus is at least 20 adults (not including the driver).

Petitioners argue that they would be entitled to a payment under *section 6421(b)(1)(A)* and therefore entitled to claim an income tax credit under *section 34(a)(2).* Respondent contends that petitioners do not meet the requirements for claiming a payment under *section 6421(b)(1)(A).*

There are three essential elements to a claim for payment under *section 6421(b)(1)(A)* in situations (like this one) where the seating capacity [**10] of each vehicle is fewer than 20 adults. A taxpayer must establish that the excise tax was paid on gasoline (1) used in an automobile bus, (2) while engaged in

furnishing (for compensation) passenger land transportation available to the general public, and (3) which was scheduled along regular routes. See *sec. 6421.* We shall address these elements separately.

II. "Automobile Bus" Requirement

Petitioners argue that the vans and 4-door sedans used to transport passengers qualify as "buses". Whether a sedan or van may qualify as an automobile bus under *section 6421* is an issue of first impression. The term "bus" for purposes of *section 6421* is not defined in the Code, the applicable regulations, or the legislative history. The legislative history suggests that Congress intended to limit the scope of *section 6421* to buses. *Section 6421* was added to the Code by section 208(c) of the Federal-Aid Highway Act of 1956, Pub. L. 84-627, 70 Stat. 394. As enacted, *section 6421(b)(1)* [*101] originally provided for a payment of excise tax "If gasoline is used * * * in vehicles while engaged in furnishing scheduled common carrier public passenger land transportation service along regular routes". The applicable [**11] version of *section 6421(b)* was amended by section 233(a) of the Energy Tax of 1978, Pub. L. 95-618, 92 Stat. 3190 (1978 amendment). The word "vehicles" was replaced with "automobile buses". The Senate report explains that "Since bus transportation is more energy-efficient than private automobile transportation, the committee believes it desirable to encourage greater use of bus transportation." S. Rept. 95-529, at 54 (1977), 1978-3 C.B. (Vol. 2) 199, 246. Although Congress made clear its intent to limit the application of the statute to buses, it never defined the word "bus". We therefore assume that Congress intended the word "bus" to carry its "'ordinary, contemporary, common meaning.'"

Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. Pship., 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)(quoting *Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)*); see also *Crane v. Commissioner, 331 U.S. 1, 6, 67 S. Ct. 1047, 91 L. Ed. 1301, 1947-1 C.B. 97 (1947)* ("Words of statutes -- including revenue acts -- should be interpreted where possible in their ordinary, everyday senses"). Therefore, we shall look to the ordinary meaning of the word "bus" to determine whether petitioners' sedans and vans qualify as buses.

[**12] In determining the ordinary meaning of a statutory term, we first look to the ordinary usage or settled meanings of the words used in the statute by Congress. *Hamm v. James (In re James), 406 F.3d 1340, 1343 (11th Cir. 2005)*; *Hefti v. Commissioner, 97 T.C. 180, 193 (1991)*, affd. *983 F.2d 868 (8th Cir. 1993)*. The word "bus" is short for the word "omnibus" and is commonly defined as "a large motor- driven vehicle designed to carry passengers usu. according to a schedule along a fixed route". Webster's Third New International Dictionary (1993); see also Webster's Tenth New Collegiate Dictionary (2002) for a similar definition. We address whether the vehicles petitioners use meet the definition of "fixed" or "regular" routes in detail infra pp. 16-20 in examining whether petitioners meet the third requirement for obtaining the credit. Notwithstanding the question of fixed routes, we do not believe that the 4-passenger sedans petitioners used qualify as large motor vehicles. Petitioners submitted closeup photographs of [*102] the sedans in question, and it is fairly obvious that the vehicles are not large, even for a sedan.

The definition of the word "omnibus" also does [**13] not favor petitioners. The word "omnibus" is defined as "a public vehicle usu. automotive and 4-wheeled and designed to carry a comparatively large number of passengers." Webster's Third New International Dictionary (1993). Although the description of "omnibus" as 4-wheeled plausibly includes a sedan, the sedans petitioners used would not be able to carry a large number of passengers.

Petitioners argue that because Congress used the term "automobile bus" and not just "bus" in the statute, they must have meant something more expansive than a traditional "bus". Petitioners justify this construction with several different arguments, all of which we reject.

A. The Prefix "Automobile" Does Not Modify the Meaning of "Bus"

Petitioners argue that because the word "automobile" precedes the word "bus" in the statute, Congress must have intended a more expansive definition than the ordinary meaning of the word "bus". Petitioners offer no definition of the phrase "automobile bus", but they simply conclude that "the term 'automobile bus' does not seem to have any significance such that any vehicle, including sedans and vans, qualify * * * if the vehicles were used for transportation [**14] which is regularly scheduled.'" This premise clearly violates "'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001)* (quoting

Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001). Further, petitioners' contention that the word "automobile bus" is insignificant also renders the 1978 amendment substituting automobile bus for vehicle superfluous. One of the stated purposes of the 1978 amendment was to "encourage greater use of bus transportation." S. Rept. 95-529, supra at 54, *1978-3 C.B. (Vol. 2) at 246*. We cannot ignore the overwhelming evidence of deliberate intent to include the word "bus" in the statute. Therefore, we reject petitioners' argument. After arguing that the term "automobile [*103] bus" has no significance in the statute, petitioners argue in the alternative that we should accept their proffered plain meaning of "automobile bus". Petitioners surmise that Congress meant to use the word "automobile" in its noun form to describe the traits that the word "bus" is [**15] supposed to have. The noun form of "automobile" is commonly defined as a "four-wheeled automotive vehicle". Webster's Third New International Dictionary (1993). Together with the word "bus", petitioners conclude that Congress meant to include all four- wheeled vehicles which travel on regular routes in defining what vehicles qualify for the exemption. Respondent argues that Congress meant the adjective form of "automobile" to describe bus, which is commonly defined as "automotive", meaning "containing within itself the means of propulsion". Id.

We agree with respondent's interpretation. There is no evidence that Congress intended the plain meaning of "automobile" to alter or expand the plain meaning of the word "bus". The legislative history accompanying *section 6421* clarifies that Congress meant only buses should qualify for the credit: "the bill

provides for the refund or credit of the taxes paid on gasoline and other motor fuels but only to the extent these fuels are used in a bus engaged in furnishing (for compensation) passenger land transportation available to the general public". S. Rept. 95-529, supra at 56, *1978-3 C.B. (Vol. 2) at 248* (emphasis added). Even if we were to [**16] accept petitioners' interpretation of the word "automobile bus", petitioners would not meet their own definition because as discussed infra pp. 1619, the transportation petitioners provided was not on fixed or regularly scheduled routes. [2]

2 Respondent cites extensive legislative history that shows how the word "automobile" has been used as a modifier in various statutes predating the Code. While that argument may have some merit, we find that it is not dispositive and therefore does not control our analysis.

B. The Legislative History to *Section 6421* Does Not Support

Petitioners' Interpretation

Petitioners argue that the following language from the legislative history accompanying the 1978 amendment of *section 6421* supports their expansive definition of "automobile bus":

[*104] Explanation of provisions

The bill removes the excise taxes on highway tires, inner tubes, and tread rubber, gasoline and other motor fuels, and lubricating oil for private intercity, local [**17] and school bus operations.

* * * *

An "intercity or local bus" means any bus which is used predominantly in furnishing (for compensation)

passenger land transportation available to the general public if either (1) the transportation is scheduled and along regular routes, or (2) the passenger seating capacity of the bus is at least 20 adults (not including the driver). Thus, under the first alternative portion of this definition, a bus which is used predominantly (that is, more than 50 percent) in providing (for compensation) scheduled transportation along regular routes (such as is provided by local transit systems or an intercity bus operation providing regularly scheduled service along regular routes) will qualify for the exemption from the taxes on tires, tubes, and tread rubber, regardless of the size of the bus involved. For nonscheduled (i.e., charter) operations (covered by the second alternative portion of the definition), the exemption is available only if the bus has a passenger seating capacity of at least 20 adults (not including [**18] the driver) and the transportation is available to the general public. The purpose of the "at least 20 passenger" requirement is to insure that, in situations where regularly scheduled service is not being furnished, vans and similar vehicles used for vanpooling or taxi service are not eligible for the exemption from these taxes (and the fuels taxes).

S. Rept. 95-529, supra at 55, *1978-3 C.B. (Vol. 2) at 247.* [3]

3 Respondent argues that the predominant use sentence does not apply to *sec. 6421* because the language in that sentence does not specifically mention gasoline or fuel taxes. We disagree. Since the first and last paragraphs both mention gasoline and fuel taxes, we conclude that the entire explanation pertains to both *secs. 6421* and *4221* and do not find that particular omission significant. Petitioners also cite the language in *sec. 48.4221-8(b)(2)*, Excise Tax

Regs., to support their interpretation of the "bus" and "regular route" requirements. Since that language is substantially the same as the language in the Senate report, we subsume its analysis in the arguments based on the language in the Senate report without reaching the question of whether those regulations are applicable.

[**19] Petitioners claim that the "predominant use" language in the legislative history allows them to qualify under the first alternative definition so long as the transportation they provide is scheduled along regular routes. We disagree.

Prior to "construing the statute so as to override the plain meaning of the words used therein" this Court requires "unequivocal evidence of legislative purpose". *Huntsberry v. Commissioner, 83 T.C. 742, 747-748 (1984).* The excerpt petitioners cites, in our opinion, does not constitute "unequivocal evidence" of legislative intent to override the plain meaning of the words used in the statute. In addition, the language petitioners cite still requires that there is a "bus [*105] which is used predominantly". S. Rept. 95-529, supra at 55, *1978-3 C.B. (Vol. 2) at 247* (emphasis added). The legislative history does not define "bus", which leaves us with the ordinary meaning of the word "bus" that we have already stated petitioners do not qualify under.

We conclude that the sedans do not qualify as "buses". Even though the legislative history petitioners cite plausibly includes vans, we do not need to evaluate whether any vans petitioners used qualify [**20] as buses because our finding that sedans are not buses precludes an application of the credit. Petitioners failed to give an accounting of how many gallons of gas to attribute to each type of vehicle for purposes of the

gasoline credit. See *sec. 6421(b)(1)*. Therefore, even if we were to hold that vans qualify as buses, petitioners fail to qualify for the gasoline credit because we have no way of discerning how many gallons of gasoline were used by either type of vehicle. [4]

4 Neither party has raised the question of burden of proof, but petitioners have the initial burden of coming forward with evidence. *Rule 142(a)*.

III. "Regular Route" Requirement

Since petitioners did not use gasoline in an "automobile bus," they are not entitled to an income tax credit under *section 34(a)(2)*. Nevertheless, for the sake of completeness, we shall determine whether petitioners provided transportation that meets the "regular route" requirement. [5] Under *section 6421(b)*, transportation must be scheduled "along regular routes" [**21] unless the seating capacity of the bus is at least 20 adults. Petitioners concede that all of the vehicles at issue seated under 20 adults. Therefore, the issue is whether petitioners provided transportation scheduled along regular routes. The Senate report issued in conjunction with the Energy Tax Act of 1978 states that in order for service to qualify as scheduled and on regular routes under the statute, the service must provide "scheduled transportation along regular routes (such as is provided by local transit systems or an intercity bus operation providing regularly scheduled service along regular routes)". S. Rept. 95-529, supra at 55, *1978-3 C.B. (Vol. 2) at 247*. Petitioners fail to satisfy this requirement.

5 Respondent no longer contests the "available to the general public" requirement.

[*106] Unlike typical local transit systems, there were no published timetables available to the general public that the sedans and vans were required to follow. The schedules were prepared the night before the travel day. [**22] Although petitioners' services were provided on a daily basis, they did not follow a regular schedule, nor were the routes they traveled "regular". A stop that was listed on a previous day's manifest might or might not have appeared on a subsequent manifest. The existence of reservation passengers and the unpredictability of subscription changes, additions, and cancellations guaranteed that the routes would vary significantly from one day to the next. Such variable scheduling by its nature cannot be considered to constitute a "regularly scheduled service along regular routes".

Petitioners again rely on the "predominant use" found in the Senate report to argue that the transportation was serviced along regular routes. Petitioners argue that the implication of that language, which was set forth supra p. 14 suggests that if a bus is used over 50 percent in providing scheduled transportation along regular routes, then it qualifies under *section 6421.* Based upon the premise that over 50 percent of their services were subscription riders, petitioners argue that they meet the "predominant use" standard.

Petitioners' argument contains several flaws. First, petitioners failed to establish [**23] that their vans and sedans were used more than 50 percent in furnishing subscription services. Petitioners attempted to elicit such information from their witnesses at trial; however, neither the president of Zuni nor the general

manager of MTMC could provide that information based on personal knowledge or any other credible source. [6] Second, even if we accepted that premise as fact, it does not impact our finding that the routes traveled by petitioners were not regular. Even with respect to manifests that contained only subscription passengers, to the extent that they existed, it was possible that passengers could change from one week to the next as a result of cancellations or new subscriptions. As evidenced at trial through the testimony of the general manager of Cosmis, there was no way [*107] of knowing, short of asking the driver, whether the vehicle followed the same or similar routes as the corresponding run on a subsequent day or week. Petitioners conceded that the information on the daily manifests was subject to change from day-to-day based on daily passenger reservations and subscriptions. An examination of the daily manifests submitted in the record reveals that no two manifests [**24] contained substantially similar patterns of destinations traveled or pickup/dropoff times. [7] The manifests had to be modified on a daily basis to accommodate all of the changes in the needs of the passengers using petitioners' services no matter whether they were regular subscribers or one-time reservation passengers. We conclude that the transportation service petitioners provided, by its very nature, requires irregularity in the routes and schedules to function properly. [8]

6 The most that these witnesses could account for is an estimate that over 50 percent of the clients were subscription passengers. The witnesses admitted that they did not know exactly (beyond an "informed guess") what

percentage of the riders were subscription and what percentage were reservation.

7 The most that can be said about the regularity of the routes traveled as evidenced in the manifests submitted is that in a given week several addresses appeared more than once and in some instances at the same time of day. However, the record is devoid of any instance where the same route was traveled from start to finish more than once. In the sample manifests provided, after a painstaking examination, there is an occasional cluster of addresses that show up more than once a week, but otherwise the routes are completely different.

[**25]

8 In their brief, petitioners offer creative constructions of "scheduled" and "regular routes" based upon various dictionary definitions. We decline to address these arguments here because we find that the legislative history clarifies what type of service Congress considered to be "scheduled" along "regular routes". Petitioners' proffered plain meaning argument lacks merit. Further, based on their argument, petitioners conclude that "regularly" means traveling the same route two or three times a week. Petitioners failed to establish that their vehicles traveled the same route more than once a week, let alone two or three times, and therefore petitioners fail to qualify under their own definition of "regular routes".

IV. The ADA Does Not Govern Our Determination

Petitioners argue that it would frustrate the purpose of the ADA to disallow petitioners' claimed gasoline tax credit. Petitioners further argue that the term "scheduled and along regular routes" should be read in light of the paratransit regulations enacted under the ADA. We disagree. The ADA is not a taxing statute, and therefore [**26] it has no applicability to whether petitioners qualify for a credit against their income taxes under *section 34*. The particular

paratransit service petitioners provide qualifies under neither the plain language of *section 6421* nor the stated legislative intent. We may not rewrite any of these provisions.

In conjunction with their ADA argument, petitioners argue that one of the underlying purposes of *section 6421* is to provide relief for local mass transportation systems, and therefore [*108] we must construe the statute to include paratransit providers as beneficiaries in order to be consistent with and further this purpose. See *Greyhound Corp. v. United States, 495 F.2d 863, 868 (9th Cir. 1974)* ("Special relief is also provided, in the case of gasoline, diesel fuel, and special motor-fuel taxes, for fuel used in the operation of local or mass transportation systems." (quoting H. Rept. 2022, 84th Cong., 2d Sess. (1956), *1956-2 C.B. 1285, 1289*)). The legislative history of the statute as amended in 1978, the statute which we are construing in this case, states as the statute's purpose "to encourage greater use of bus transportation." S. Rept. 95- 529, supra at 54, [**27] *1978-3 C.B. (Vol. 2) at 246* (emphasis added). Petitioner cites authority on statutory interpretation that notes that there is a presumption against an implied repeal of legislative purpose. However, we do not consider our holding to conflict with the purpose of the statute as originally enacted. Nor do we find that the 1978 amendment intended to repeal the stated purpose of the 1956 act. Rather, the 1978 amendment simply designated the scope of the local mass transportation systems that Congress wanted to qualify under *section 6421*. We cannot accommodate petitioners' request to ignore words in the statute and gloss over stated congressional intent to achieve an overly broad

interpretation that allows petitioners to qualify for the credit.

V. Conclusion

Petitioners do not qualify under the *section 34* credit for gasoline taxes because the transportation they provided did not meet the requirements enumerated in *section 6421*. Petitioners' sedans did not qualify as buses, and petitioners did not provide any evidence for us to bifurcate the credit allowed toward their vans that may have possibly qualified. Thus we decline to reach that issue of whether the vans qualify in [**28] light of the failure of proof. Nor were petitioners' transportation services scheduled and along regular routes. The routes petitioners traveled day-to-day were subject to change based on a myriad of factors. None of the constructions of the statutes petitioners offered were persuasive.

[*109] To reflect the foregoing,

Decisions will be entered for respondent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 04 2008
THOMAS K KAHN
CLERK

No. 06-16583-CC

MEDICAL TRANSPORTATION MANAGEMENT CORPORATION, ZUNI TRANSPORTATION, INC.,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent.

Petition for Review of a Decision of the United States Tax Court

---

Before: ANDERSON and PRYOR, Circuit Judges, and VINING, * District Judge.

PER CURIAM:

The petition (s) for rehearing filed by Petitioners is DENIED.

ENTERED FOR THE COURT:

SIGNED
UNITED STATES CIRCUIT JUDGE

---

* Honorable Robert L. Vining, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

NO. 06-16583-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE 11TH CIRCUIT

MEDICAL TRANSPORTATION MANAGEMENT CORPORATION

Petitioner-Appellant,
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ZUNI TRANSPORTATION, INC.,

Petitioner-Appellant,
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

PETITION FOR REHEARING

On Appeal from the United States Tax Court

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December 19, 2007

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Medical Transportation Management Corporation
vs.
Commissioner of Internal Revenue
(Appeal No. 06-16583-CC)

Pursuant to 11th Cir. R. 26.1, Petitioners/Appellants (hereinafter "Taxpayers") hereby certify that the Certificate of Interested Persons and Corporate Disclosure Statement filed in Taxpayers Reply Brief is a complete Certificate of Interested Persons and Corporate Disclosure Statement for Taxpayers.

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ARGUMENT

Pursuant to Rule 40 of the Federal Rules of Appellant Procedure and 11th Cir. R. 40-1, Taxpayers, Medical Transportation Management Corporation (MTMC) and Zuni Transportation, Inc. (Zuni) hereby petition the Court to grant rehearing on the following two issues:

1. The Court, after holding that "automobile bus" simply means bus, states at page 8 of its Opinion, second to last paragraph:

> The taxpayers' argument does not require that we determine when a vehicle can be classified as a bus. The taxpayers concede that their vehicles are not buses. We leave for another day the question whether a van or other vehicle can be classified as a bus.

The first sentence above is factually incorrect. Taxpayers vigorously argued in their briefs that their vans and sedans constituted "automobile bus[ses]" and did ask this Court to find that their vans and sedans were "automobile bus[ses]." With respect to the second sentence, it is true that Taxpayers' admitted that the vans and sedans were not buses. But this admission pertained to busses as understood in the conventional sense of the word. For example, the large metro-transit busses and the like. That Taxpayers' vans and sedans are not busses like metro-transit busses and the like is indisputable and obvious. However, for the substantial reasons set forth in their

Brief and Reply Brief, Taxpayers believe their vans and sedans were and are "automobile bus[ses]." This Court's apparent holding that "automobile bus" simply means bus disqualifies Taxpayers' vans and sedans. However, the Court cannot then contradict this holding and state, as it does in the third sentence above, that "we leave for another day whether a van or other vehicle can be classified as a bus." This is illogical as the Court's apparent holding disqualifies both vans and sedans.

If on the other hand, the Court is saying that vans and other vehicles can be classified as busses under the statute, then Taxpayers are even more baffled by the Opinion. For Taxpayers' vigorously argued for this interpretation of the term "automobile bus" (i.e. to include Taxpayers' vans and sedans) throughout their briefs.

Accordingly, Taxpayers request that the Court clarify this matter by deleting the contradictory language and stating that "automobile bus" simply means bus and that Taxpayers' vans and marked and restricted sedans are not buses.

2. The Court at page 8 of its Opinion, second paragraph, second sentence, in quoting Taxpayers, states:

> The taxpayers "would define th[e] term ['automobile bus'] to mean a vehicle which is marked and restricted for public mass transportation," which includes "all marked and restricted for public mass transit use sedans."

The above is an incomplete definition of the term "automobile bus" proffered by Taxpayers and pertains only to sedans. Page 19 of Taxpayers' Reply Brief sets out Taxpayers' proposed definition for "automobile bus" as follows:

> Contrary to the IRS statement that Taxpayers' believe that the term "automobile bus" includes only vehicles which are marked for public use, see IRS Brief footnote 11 at page 47, Taxpayers believe that the term "automobile bus" means a vehicle which functions like a bus and provides transportation which is scheduled and along regular routes. In this definition, Taxpayers include all buses and vans which provide transportation which is scheduled and along regular route (regardless of size and markings) as well as all marked and restricted for public mass transit use sedans which provide such scheduled and along regular route transportation. Of course, vehicles (and not necessarily buses) with seating capacities of 20 passengers not including the driver would explicitly qualify regardless of schedules or routes followed.

Thus, Taxpayers' definition of "automobile bus" includes busses and vans regardless of markings and restrictions, while sedans are included only if marked and restricted for mass transit use.

CONCLUSION

For the foregoing reasons, Taxpayers pray that this Court clarify the foregoing statements in its Opinion.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Petition for Rehearing have been served on Counsel for the IRS, Anthony T. Sheehan, Esq., U.S. Department of Justice, Tax Division, P.O. Box 502, Washington D.C., 20044, by causing the same to be deposited in the United States mail in an envelope with adequate postage affixed thereto, and that one (1) original and four (4)copies of the same have been dispatched to the Clerk of the United States Court of Appeals for the 11th Circuit, 56 Forsyth Street, NW, Atlanta, Georgia 30303 on this 19th day of December, 2007.

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PERTINENT PROVISIONS OF SECTION 6421

Section 6421(b) Intercity, local, or school buses.

(1) Allowance. Except as provided in paragraph (2) and subsection (I), if gasoline is used in an automobile bus while engaged in--

(A) furnishing (for compensation) passenger land transportation available to the general public, or

(B) the transportation of students and employees of schools (as defined in the last sentence of section 4221(d)(7)(C)

the Secretary shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to the product of the number of gallons of gasoline so used multiplied by the rate at which tax was imposed on such gasoline by section 4081

(2) Limitation in case of nonscheduled intercity or local buses. Paragraph (1)(A) shall not apply in respect of gasoline used in any automobile bus while engaged in furnishing transportation which is not scheduled and not along regular routes unless the seating capacity of such bus is at least 20 adults (not including the driver).

SENATE REPORT No. 95-529; 95TH CONGRESS 1st Session; H.R. 5263 ENERGY PRODUCTION AND CONSERVATION TAX INCENTIVE ACT
October 21, 1977.-Ordered to be printed

SENATE REPORT No. 95-529; 95TH CONGRESS 1st Session; H.R. 5263

Page 54

5. Removal of Excise Tax on Certain Items Used on or in Connection with Intercity, Local, or School Buses (sec. 1026 of the bill and secs. 4071, 4092, 4221(e), 6416(b), 6421(b)(1), 6424 and 6427 of the Code)

Present law

Presently, privately owned and operated buses use products that are subject to the manufacturers excise taxes on tires, tubes and tread rubber, n1 gasoline, n2 and lubricating oil, n3 as well as the retailers excise tax on diesel fuel and other special motor fuels. n4 Complete exemption is provided from these excise taxes for State and local governments (secs. 4041(g)(2) and 4221(a)(4)) and for tax-exempt educational organization (secs. 4041(g)(4) and 4221(a)(5)). A partial exemption (2-cents-a-gallon refund or credit) is available from the tax on gasoline and other motor fuels for use by a privately owned local transit system for the portion of its total fare revenue represented by "commuter fare revenue" (secs. 6421(b) and (d)(2) and 6427(b)). n5

The revenues from these taxes paid with respect to

highway use now go into the Highway Trust Fund (through September 30, 1979).

Reasons for change

Since bus transportation is more energy-efficient than private automobile transportation, the committee believes it desirable to encourage greater use of bus transportation. In addition, the committee considers it appropriate to make the excise tax treatment of private transit and school bus operations consistent with governmental and tax-exempt educational bus operations. Therefore, the committee decided to extend the present exemptions from the taxes on tires, tubes and tread rubber, gasoline and other motor fuels, and lubricating oil to privately owned intercity and local bus operations and private school bus operations not presently exempt from these taxes.

Page 55

Explanation of provisions

The bill removes the excise taxes on highway tires, inner tubes and tread rubber, gasoline and other motor fuels, and lubricating oil for private intercity, local and school bus operations.

In the case of the excise taxes on highway tires, inner tubes and tread rubber, the bill provides an exemption for sales by a manufacturer, producer, or importer of such items "sold for use" by the purchaser on or in connection with an intercity, local, or school bus. It is contemplated that such tires, tubes and tread rubber

would be sold tax-free only if appropriate evidence of exemption is furnished by the purchaser. Where the sale of such items is made other than by the manufacturer, producer, or importer, the bill provides for a refund (or credit) of the tax when the item is "sold for use" by the purchaser on or in connection with an intercity, local or school bus.

An "intercity or local bus" means any bus which is used predominantly in furnishing (for compensation) passenger land transportation available to the general public if either (1) the transportation is scheduled and along regular routes, or (2) the passenger seating capacity of the bus is at least 20 adults (not including the driver). n6 Thus, under the first alternative portion of this definition, a bus which is used predominantly (that is, more than 50 percent) in providing (for compensation) scheduled transportation along regular routes (such as is provided by local transit systems or an intercity bus operation providing regularly scheduled service along regular routes) will qualify for the exemption from the taxes on tires, tubes, and tread rubber, regardless of the size of the bus involved. For nonscheduled (i.e., charter) operations (covered by the second alternative portion of the definition), the exemption is available only if the bus has a passenger seating capacity of at least 20 adults (not including the driver) and the transportation is available to the general public. The purpose of the "at least 20 passenger" requirement is to insure that, in situations where regularly scheduled service is not being furnished, vans and similar vehicles used for vanpooling or taxi service are not eligible for the exemption from these taxes (and the

fuels taxes).

Charter service is to be considered "available to the general public" if the taxpayer offers this service to more than a limited number of persons or organizations. For example, if a bus operator normally provides charter operations through travel agencies, but his buses are available for chartering by the general public, the buses predominantly used in providing such service would be considered "intercity or local buses." However, if the bus operator is engaged in providing charter services to only one person, group, or organization, or a limited number of persons, with respect to a particular bus, such a bus would not qualify as an "intercity or local bus." The purpose of this limitation is to provide these exemptions only for buses which are used in a passenger transportation business available to the general public (for compensation) and not to buses used primarily as part of a non transportation [Page 56] business or for the personal use of the operator, one family, one group, or organization, or contract use with a limited number of persons.

A "school bus" means any bus with respect to which "substantially all" (that is, at least 85 percent) of the use involves transporting students and employees of schools. If, in connection with the transportation of students or employees of schools, a bus is driven without passengers to or from a point to or from which students or employees of schools are transported (that is, so-called "deadheading"), this use shall be considered as a use which involves transporting students or employees of schools. A school is any

educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of students in attendance at the place where the educational activities are regularly conducted. Thus, the exemption from these taxes applies to use by both tax-exempt and taxable schools. Also, it applies to a private contractor who operates a bus for tax-exempt or taxable schools.

The bill provides for the refund or credit of the taxes paid with respect to lubricating oil used in an intercity, local, or school bus. If the bus meets the "predominant use" or "substantially all the use" test, the tax on all the lubricating oil used in the bus is to be credited or refunded.

In addition, the bill provides for the refund or credit of the taxes paid on gasoline and other motor fuels but only to the extent these fuels are used in a bus engaged in furnishing (for compensation) passenger land transportation available to the general public or in school bus transportation operations. The allocation of fuel to these nontaxable uses may be determined on a mileage basis (for the same or comparable vehicles) or on an actual fuel use basis. Use in "passenger land transportation available to the general public" means the same type of use that would qualify in meeting the predominant use test for intercity or local buses, and use in school bus transportation operations means the same type of use that would qualify in meeting the "substantially all the use" test for school buses.

Effective date

These provisions are effective on the first day of the first calendar month which begins more than 10 days after the date of enactment of this Act.

Revenue effect

These provisions are estimated to reduce budget receipts by $13 million for fiscal year 1978 and each year thereafter. These revenues would otherwise go into the Highway Trust Fund (through September 30, 1979).

Energy savings estimate

It is estimated that the energy savings as a result of these provisions will be negligible.

n1 A tax of 10 cents a pound on highway tires and inner tubes and of 5 cents a pound on tread rubber for highway use (sec. 4071). (The taxes on highway tires and inner tubes are scheduled to be reduced to 5 cents a pound and 9 cents a pound, respectively, on October 1, 1979, while the tax on tread rubber expires on that date.)

n2 A tax of 4 cents a gallon (sec. 4081).

n3 A tax of 6 cents a gallon (sec. 4091).

n4 A tax of 4 cents a gallon (sec. 4041).

n5 The partial exemption is available only if at least 60 percent of the total passenger fare revenue derived during a calendar quarter from "scheduled common carrier public passenger land transportation service along regular routes" is from "commuter fare revenue." Commuter fare revenue is defined (sec. 6421 (d)(2)) as fares derived from transportation of persons and attributable to (1) amounts paid which do not exceed 60 cents, (2) amounts paid for commuting or season tickets for single trips of less than 30 miles, or (3) amounts paid for commuting tickets for one month

or less.
n6 The type of use which would qualify as "use in passenger land transportation available to the general public" includes not only mileage traveled with passengers (which otherwise meets the use qualification), but also use which is incident to such passenger transportation (such as "deadheading").

Page 57

57 6. TAX CREDIT FOR VANS USED IN VAN POOLING (SEC 1027 (A) OF THE BILL AND NEW SEC. (46 (C)(6) OF THE CODE)

PRESENT LAW

Under present law, an employer who purchases a van to transport individuals to and from work may claim the regular investment credit with respect to the purchase of the van. [fn39] since vans designed for transportation of passenger normally are treated as having a useful life of about 4 years, the investment credit with respect to such vans is 3 1/3 percent of the purchase price in the case of a van used exclusively for business purposes.

REASONS FOR CHANGE

A small but increasing number of employers have begun purchasing vans (or buses) to provide transportation for their employers to and from work. This 'van pooling' is an energy efficient means of transportation in comparison to commutation to work by private automobile. Frequently, the employer can defray at least the operating expenses of the van by charging the employees for these expenses.

The purchase of a passenger van which would seat at least nine individuals is relatively expensive. These vans normally cost about $8,000 at the current time. The committee concluded that it was desirable to provide a greater incentive for the purchase of such vans for van pooling purposes than is provided under current law. Accordingly, the committee amendment provides a 20 percent credit for the purchase of a van by an employer to be used for van pooling purposes if the useful life of the van is at least 3 years.

EXPLANATION OF PROVISION

The bill provides that, if an employer purchases a new van with a useful life of at least 3 years and a seating capacity of nine person (including the driver) and substantially all the use of the van is for transporting his employees to and from work, the employer is entitled to the full 10 percent investment credit and the special 10 percent business energy investment credit.

To qualify for this treatment, substantially all the use of the van must be for the transporting of the taxpayer's employees to and from their place of employment, and the number of employees transported on a regular basis must be at that the van is designed to carry. This van pooling use may be on a for profit or nonprofit. *58 **7993 Basis in which the cost of such arrangement are primarily paid for by the individuals utilizing such arrangement or by the employer of such individuals.

If, prior to the expiration of 36 months from the time the van is placed in service, it ceases to be used for van pooling purposes, both the regular investment credit and the business energy investment credit shall be recaptured.

Use of a van for purposes other than van pooling shall not result in a recapture of the credit if substantially all (that is, at least 85 percent) of the use of the van on a mileage basis for at least 36 months after purchase is for van pooling.

EFFECTIVE DATE

This provision applies to vans purchased after December 31, 1977 and before January 1, 1986.

REVENUE EFFECT

It is estimated that this provision will result in a decrease in budget receipts of less thatn $1 million annually.

ENERGY SAVINGS ESTIMATE

This provision will result in a negligible energy savings.

Report of the Ad Hoc Committee On Energy of the House of Representatives , dated July 27, 1977, S. Report No. 95-543 (Vol 1) (1977) at page 49-50

Ad Hoc Committee Amendments - Tax on Gasoline and other Motor Fuels

Increased gasoline and motor fuel taxes; Energy conservation and conversion trust fund

The Ways and Means Committee bill did not impose new taxes on gasoline or other motor fuels and did not provide a trust fund to be used for energy conversion and conservation or for payments to the States to reimburse them for anticipated loss of revenues from motor fuels taxes.

The Ad Hoc Committee amendment would impose a fuel conservation tax on gasoline, diesel fuel, and special motor fuels in addition to present 4-cents-a-gallon tax. This tax would be imposed at a rate of 2-cents-a-gallon in 1978, and would be increased to 4-cents-a-gallon in 1979 and for subsequent years. [1]

The Ad Hoc Committee amendment would also establish an Energy Conservation and Conversion Trust Fund in which the net revenues from the fuel conservation taxes are to be deposited. In general, this trust fund is to be divided into three accounts.

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[1] Under this amendment, these taxes would not apply to fuel used in general aviation (but would apply under a separated committee amendment).

One-eighth (12.5 percent) of the funds deposited into the trust fund is to be transferred to a "States Account." The amounts in this account are to be allocated among the States based on fuel consumption within the States. The States are required to use these payments in transportation programs, including the maintenance and rebuilding of highways. One-half (50 percent) of the amounts deposited into the trust fund is to be transferred to the "Energy Program Account," which is to be used for energy programs generally, such as, the maintenance of the Strategic Petroleum Reserve and for research and development of new energy technology. Three-eights (37.5 percent) of the amount deposited into the trust fund is to be transferred to a "Mass Transportation Account." The Mass Transportation Account is to be used for mass transportation by bus, rail, and so forth; for exclusive or preferential lanes for buses, vans and cars; and for car and van pooling. The amounts in each of the accounts are to be expended only as appropriated by the committees of Congress having jurisdiction over the matters involved.

Increase in tax on fuels used in noncommercial aviation

The Ways and Means Committee bill did not increase the taxes on fuels used in general (noncommercial) aviation (presently, a tax of 7 cents a gallon). However, the Ad Hoc Committee amendment would impose additional taxes on general aviation fuel (including gasoline). These taxes would be imposed at the rate of 2 cents a gallon in 1978 and 4 cents a gallon in 1979 and later years. The revenues

from these taxes would be deposited in the Energy Conservation and Conversion Trust Fund.

Joint Committee On Taxation, Report for the Committee on Finance, United States Senate dated September 16, 1977, 95-171, pages 32-33

B. House Bill
(Sec. 2028 of the bill and secs. 4071, 4092, 4221(e), 6416(b), 6421(b)(1), 6424, and 6427 of the Code)

Exemption from excise taxes on highway tires, inner tubes and tread rubber

The excise taxes on highway tires, inner tubes and tread rubber would not apply to with respect to items used on intercity, local, and school buses.

Definitions of bus operations qualifying for exemptions

To qualify for the exemption from (or refund of) the taxes on tires, tubes, tread rubber, or lubricating oil, the items must be used on or in an "intercity or local bus" or a "school bus". An "intercity or local bus" is any bus which is used predominantly (that is, more than 50 percent) in furnishing (for compensation) passenger land transportation available to the general public, if either (1) the transportation is scheduled and along regular routes, or (2) in the case of charter or other non-scheduled operations, the passenger seating capacity of the bus is at least 20 adults (not including the driver). A "school bus" means any bus with respect to which "substantially all" (that is, at least 85 percent) of the use involves transporting students and employees of schools.

Repayment of tax on lubricating oil in intercity, local, or school buses

A credit or refund will be provided for the excise tax paid on lubricating oil used in intercity, local, or school buses (as defined above).

Refund or credit of excise taxes on gasoline or other motor fuel for intercity, local, or school bus operations

The taxes paid on gasoline and other motor fuels will be refunded or credited to the extent these fuels are used in a bus engaged (1) in furnishing (for compensation) passenger land transportation available to the general public or (2) in school transportation operations. The allocation of fuel to these nontaxable uses may be determined on a mileage basis or on an actual fuel use basis.

Effective date

These provisions are effective on the first day of the first calender month which begins more than 10 days after the date of enactment of this Act.

Revenue effect

These provisions are estimated to reduce budget receipts by $13 million for fiscal year 1978 and each year thereafter. These revenues would otherwise go into the Highway Trust Fund (through September 30, 1979).

Energy savings estimate

It is estimated that the energy savings as a result of these provisions will be negligible.

C. Administration Position on the House Bill

The Administration supports these provisions of the House bill.

D. Other Proposal

It has been suggested that similar tax treatment should be provided for taxicabs, at least where shared ride programs are in effect..

*** THIS SECTION IS CURRENT THROUGH THE JANUARY 31, 2007 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 26 -- INTERNAL REVENUE
CHAPTER I -- INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY
SUBCHAPTER D -- MISCELLANEOUS EXCISE TAXES
PART 48 -- MANUFACTURERS AND RETAILERS EXCISE TAXES
SUBPART N -- EXEMPTIONS, REGISTRATION, ETC.

26 CFR 48.4221-8

§ 48.4221-8 Tax-free sales of tires, tubes, and tread rubber used on intercity, local, and school buses.

(a) In general. Under section 4221(e)(5), the taxes imposed by section 4071(a)(1), (3) and (4) shall not apply to sales by a manufacturer, producer, or importer of tires of the type used on highway vehicles or inner tubes for tires sold for use by the purchaser on or in connection with a qualified bus, or to the sales by a manufacturer, producer, or importer of tread rubber sold for use by the purchaser in the recapping or retreading of any tire to be used by the purchaser on or in connection with a qualified bus if the requirements of this section are met.

(b) Meaning of terms -- (1) Qualified bus. "Qualified bus" means an intercity, local, or school bus.

(2) Intercity or local bus. "Intercity or local bus" means any automobile bus which is used predominantly (more than 50 percent) in furnishing (for compensation) passenger land transportation available to the general public if such transportation is scheduled and along regular routes, or if the seating capacity of the bus is at least 20 adults (not including the driver). In determining predominant use, mileage traveled with passengers as well as mileage traveled incidental to such passenger transportation, such as "deadheading", is counted. Under the first alternative, the size of the bus is not relevant for purposes of determining whether or not the use of the bus qualifies for the exemption. Under the second alternative, for non-scheduled bus operations, such as that provided by charter buses, the exemption is available only if the bus has a passenger seating capacity of at least 20 adults and the transportation is available to the general public. For purposes of determining whether the bus has a seating capacity of at least 20 adults, the bus driver is not included. Service is available to the general public if bus service is used in a passenger transportation business in which service is offered to more than a limited number of persons, groups, or organizations.

(3) School bus. "School bus" means any automobile bus in which "substantially all" (85 percent or more) of the use involves transporting students and employees of a school. Incidental use (deadheading) of the school bus without passengers to or from a point to which

students or employees of school are transported is considered to be a use which involves transporting students or employees of schools. A school is any educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are carried on. Tax-exempt schools, taxable schools, and a private contractor who operates a bus for tax-exempt or a taxable school may qualify for the tax exemption if all the requirements of this section are met.

REST OMITTED.

FORMER § 48.6421 (a)-1 PAYMENTS TO ULTIMATE PURCHASER OF GASOLINE USED FOR CERTAIN NONHIGHWAY PURPOSES

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(c) *Meaning of terms.*-(1) *Highway vehicles.*-The term "highway vehicle" has reference to the type of vehicle and not to the use which is made of the vehicle. The term means any vehicle which is propelled by its own motor or engine and which is of the type used for highway transportation. Such term does not include any vehicle which moves exclusively on rails. It does include automobiles, trucks, buses, highway tractors, trolley buses, and other similar type vehicles. The term "highway vehicle" does not include any vehicle, which, although propelled by means of its own motor, is of a type not used for highway transportation, that is, of a type designed and manufactured for a purpose other than highway transportation. For example, vehicles such as earth movers, power shovels, trench diggers, and bulldozers, which are designed and manufactured as self-propelled units for "off-the-road" operations, are not highway vehicles. Neither are such motorized vehicles as road graders or rollers, which are designed and manufactured for construction or maintenance of roads, considered to be highway vehicles. The same is true of farm tractors, cotton pickers, and other motorized agricultural implements of a similar nature. However, the fact that equipment or machinery having a specialized use (as for example, an air compressor, crane, or specialized oil-field machinery) is mounted on a vehicle which, apart from such equipment or machinery, is of a type used for

highway transportation will not remove such vehicle from classification as a highway vehicle.

42 USC Section 12143(a), titled "Paratransit as a complement to fixed route service" provides in relevant part that it is discrimination:

> For a public entity which operates a fixed route system...to fail to provide with respect to the operations of its fixed route system... paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.